

**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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**COMPLETE TITLE OF CASE**

AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY,

Appellant,

v.

ENSZ & JESTER, P.C., et al.,

Respondents.

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**DOCKET NUMBER WD73401**

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**DATE:** October 25, 2011

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**APPEAL FROM**

The Circuit Court of Jackson County, Missouri  
The Honorable Ann Mesle, Judge

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**APPELLATE JUDGES**

Division One: Victor C. Howard, Presiding Judge, and Alok Ahuja and  
Karen King Mitchell, Judges

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**ATTORNEYS**

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## MISSOURI APPELLATE COURT OPINION SUMMARY MISSOURI COURT OF APPEALS, WESTERN DISTRICT

AMERICAN NATIONAL PROPERTY )  
AND CASUALTY COMPANY, )

Appellant, )

v. )

ENSZ & JESTER, P.C., et al., )

Respondents. )

**OPINION FILED:  
October 25, 2011**

WD73401

Jackson County

Before Division One Judges: Victor C. Howard, Presiding Judge, and  
Alok Ahuja and Karen King Mitchell, Judges

This case involves a professional negligence claim, a breach of fiduciary duty claim, and a breach of contract claim. The issue is whether and to what extent section 537.060 bars recovery on the claims. That section discharges a settling tortfeasor from liability to a second tortfeasor when the liability is based in contribution or indemnity for the same injury to which the settlement agreement applied, unless indemnity is expressly or impliedly provided for by contract or vicarious liability applies.

The plaintiff does not allege that it entered into a contract that expressly or impliedly provided for indemnity, and it does not allege that it was held vicariously liable for the defendants' conduct. Therefore, *to the extent* the plaintiff is seeking indemnification from the defendants, its claims are barred. However, part of the relief plaintiff seeks cannot properly be deemed "indemnification," and therefore section 537.060 does not apply to it.

**AFFIRMED IN PART; REVERSED IN PART; REMANDED.**

**Division One holds:**

If the plaintiff seeks reimbursement from the defendant for amounts the plaintiff paid in discharging a liability to a third party, the claim is for "indemnity," irrespective of whether the plaintiff calls it something else. *See Cardinal Glennon Hosp. v. Am. Cyanamid Co.*, 997 S.W.2d

42, 45 (Mo. App. E.D. 1999). Though it has not called its claims “indemnity,” it is clear that Appellant American National Property and Casualty Company (“American National”) is attempting to shift responsibility for a bad-faith claim asserted by its insured to Respondent Ensz & Jester, P.C. (“Ensz & Jester”), which was the law firm that American National hired to represent the insured. American National cannot avoid the application of section 537.060 by disguising its indemnity claim as something else. *See id.*

However, not all of American National’s claims are for indemnity. In seeking a refund of the fees it paid Ensz & Jester, American National is not attempting to shift responsibility for the damages it incurred by virtue of being liable to its insured. Unlike its damages associated with the insured’s bad-faith claim, American National’s claim for attorneys’ fees incurred in the underlying lawsuit could conceivably exist even if the bad-faith claim did not. *Cf. Cardinal Glennon*, 997 S.W.2d at 45-46. Since the claim to a refund of fees is not for “indemnity,” section 537.060 does not discharge any liability that Ensz & Jester may have with respect to that claim.

Section 537.060’s discharging provision applies to tortfeasors liable for the same injury unless (1) one of them has contractually agreed to indemnify the other; or (2) one was held vicariously liable for the other’s conduct. *Bostic v. Bill Dillard Shows, Inc.*, 828 S.W.2d 922, 928 (Mo. App. W.D. 1992). Since it is undisputed that neither circumstance is present here, section 537.060’s discharging provision applies to American National’s indemnity claims.

**Opinion by: Karen King Mitchell, Judge**

October 25, 2011

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THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.